

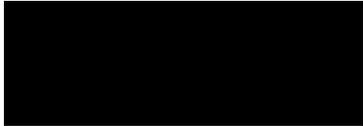


U.S. Department of Justice
Immigration and Naturalization Service



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OFFICE OF ADMINISTRATIVE APPEALS
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File: WAC 01 136 57415

Office: CALIFORNIA SERVICE CENTER

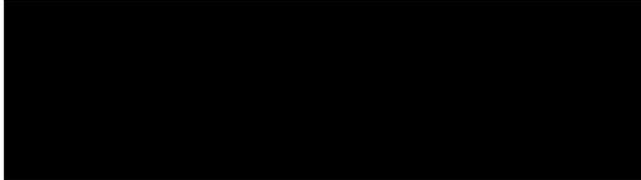
Date: JAN 10 2003

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act,
8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is described as a Japanese book and CD store. It seeks to employ the beneficiary temporarily in the United States in a new office, in the capacity of a manager or executive, namely as its general manager. The director determined that the petitioner had failed to establish that the beneficiary would be employed primarily in a qualifying managerial or executive capacity.

On appeal, counsel presents a statement from the petitioner and additional evidence.

To establish L-1 eligibility under Section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and seeks to enter the United States temporarily to continue to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien

performed abroad.

The Form I-129, Petition for a Nonimmigrant Worker, was filed on March 15, 2001. The petitioner was incorporated in the State of Hawaii on December 1, 2000. Therefore, the petitioner must be considered a new office.

If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, 8 C.F.R. 214.2(1)(3)(v) states that the petitioner shall submit evidence to establish that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three-year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The issue in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

"Managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

"Executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner states that there is a strong market in the sales and rental of used foreign and domestic CDs, books and magazines in Honolulu, and that with additional expansion throughout the rest of Hawaii in the future, that it believes that it can fill that niche. Eventually, the petitioner hopes to expand its services and that its "...Hawaii operations will become a

stepping stone for marketing to English-speaking consumers."

The petitioner's business plan states:

[REDACTED] stated [sic] a business as a subsidiary company of [REDACTED]. Currently, we are doing sales on new and used books, and CD's. We have made our future goal to expand our business and have each stop [sic] in Big Island, Maui, and Kauai. As a result, we hope to provide our staff a great opportunity to have an intercultural experience as well as to cultivate an intercultural perspective through an interchange of personnel between Japan and Hawaii. We [REDACTED] hope to have a great prospect through our business

In a letter dated March 12, 2001, counsel states that the petitioner is already open as a new and used book and CD store in Honolulu "which is exactly the same enterprise its Japan affiliate conducts." In another submission, the petitioner states that it will employ only a vice president (Nobukatsu Naito) and a clerk, and that it has invested \$100,000.00 to date in the United States entity.

The petitioner states that it currently employs two United States citizens as staff to do the administrative and sales work for the company. The petitioner adds that it wishes to send Mr. Akihiro Kagiya, who is a section manager of one of its stores in Tokyo, Japan, to manage the Honolulu store.

The petitioner states that the beneficiary has been employed with its parent company since 1997 and is currently the "CD Section Chief" of the Sasazuka Store in Japan. The petitioner also states that the beneficiary graduated from the Institute of Technology of Jokkaido in 1987, with a degree in mechanical engineering. The petitioner adds:

As the on-site general manager of L Company, he [the beneficiary] will be responsible for all on-site managerial and executive decisions for the U.S. operations subject to consultation with Japan Company. He will hire the local staff and make all financial decisions subject to general overview from the directors.

In a response to the director's request for additional evidence, in a letter dated May 15, 2001, the petitioner states that the beneficiary was first hired in 1997 to be the "Section Chief manager of the Astringent Sasazuka Store [REDACTED] Japan..." and that he is selected to manage the United States store because of his knowledge and experience in the management of the rental video and CD sections of the petitioner's stores in Japan. The petitioner also states that its success is due to its

unique ability to be able to select inventory that is appealing "to the market," that the beneficiary also possesses this talent, and that the beneficiary reads, writes, and "generally" speaks English, "...which would be a necessary skill in opening an A-Back type of operation in the U.S." Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

The beneficiary's resume indicates "occupations" held since 1997 as:

...The corporation Because retiring is done in March...The corporation Nihon A-Back in March of the same year...The Rental video, thecd [sic] section chief of the astringent Sasazaukia office working.

A certified translation of the beneficiary's payroll record indicates that he was paid a wage as a "Section Manager" in 1999 and 2000.

On appeal, the petitioner states that the foreign entity is not a small or single retail store, but that it consists of a main office and three large-volume store operations and locations. The petitioner previously had submitted several photographs of what appear to be video and magazine stores. The petitioner states that the "revenues" for the stores exceed 23-24 million yen a month.

Various organizational charts also have been submitted with the petition.

An undated organizational chart entitled "Positions in A-Back Japan of Akihiro Kagiya" indicates that the beneficiary serves as the "Section (Operational) Manager" of the division with oversight on exports, imports, sales, and marketing, of the Baku, Hatsudai, and Sasazuka stores. This same chart indicates that the beneficiary also provides concurrent management oversight over the Sasazuka store where he serves as the store manager, and supervises four "senior marketing employees" (who work concurrently) at the Baku store, along with two "clerks."

In response to the director's request for additional evidence, the petitioner also provided an additional organizational chart. The untitled, undated organizational chart that lists Haruki Kageyama as the "Representative Director/President" also lists the beneficiary as the "Operations/Supervising Manager" in Division 2 (the "Export/ Import Sale/ Marketing Division") for A-Back Hawaii, Inc. This chart also lists an "Operations Responsible Officer" with five individuals reporting to that division. The relationship between the Operations Responsible Officer and the beneficiary's position is not explained further.

On appeal, the petitioner asserts that any confusion that may surround the organizational charts may stem from the translations originally submitted and that the beneficiary does not merely supervise the five employees as could be possibly interpreted from a first [or subsequent] reading of that particular chart. The petitioner states that these flow charts, albeit without blocks and lines of authority, must be read vertically as well as horizontally. Here, the petitioner refers to the beneficiary's division and role:

This division makes decisions regarding the selection, ordering, inventory, sales, and marketing of the books, CDs, videos and other entertainment merchandise. The executive officer in charge is Teruaki Kubo and the actual operational manager is Akihiro Kagiya (also translated as section manager.) Mr. Kagiya in turn supervises the employees in this division which are noted in the second column in the flowchart. This is where the flowchart may be confusing.

The employees in this column do not belong to one store but are divided among two stores. The employees under Mr. Kagiya are experienced senior employees who make decisions and recommendations on the ordering and selection of CDs and merchandise. Therefore, they are not the low tier retail clerks. The low tier retail clerks are named in the third column described below.

The petitioner states that the beneficiary also is the store manager for the Sasazuka store, and that he holds the two positions of the operational manager in Division 2 and the store manager for the Sasazuka store concurrently. The petitioner states that the beneficiary's actual desk is at the main office on the third floor of the Baku building, and that "He frequently checks on the Sasazuka store but he is not onsite constantly."

The petitioner has submitted another flowchart on appeal. The petitioner states that this flowchart demonstrates that the beneficiary operates in the two positions. The petitioner states:

While the retail clerks in Division 3 only sell and man the registers, the Division 2 employees have the responsibilities to keep track of CD and merchandise sales and ordering, and to be resources for the first line clerks. To also point out the difference between the Division [sic] 2 and Division 3 employees, the Division 2 employees receive approximately a \$1.00 more per hour in hourly wages than the Division 3 employees.

While the petitioner has presented additional clarifications and explanations, the record does not support a finding that the beneficiary will be employed in a managerial or executive

position. A manager or executive may manage or direct the management of a function of an organization. However, it must be clearly demonstrated that the manager or executive does not directly perform the function. The petitioner has not established that the beneficiary functions at a senior level within an organizational hierarchy. The petitioner has not satisfactorily demonstrated that the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization. The petitioner has not established that the beneficiary will manage a subordinate staff of professional, managerial or supervisory personnel who will relieve him from performing the services of the corporation. The evidence in the record does not demonstrate that the beneficiary will be involved in something other than performing the day-to-day functions and operational activities of the company. Upon review, it cannot be found that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has presented insufficient evidence to establish its financial ability to remunerate the beneficiary, or that the petitioner's operation, within one year of the approval of the petition, will support an executive or managerial position. In addition, the record contains insufficient evidence to establish that the beneficiary has been employed in an executive or managerial capacity for one continuous year in the three-year period preceding the filing of the petition. As the appeal will be dismissed on the grounds discussed, these issues need not be addressed further.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.